In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1666

NORTHERN VIRGINIA REGIONAL PARK AUTHORITY, ET AL., PETITIONERS

v.

UNITED STATES CIVIL SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-12a) is reported at 437 F. 2d 1346. The opinion of the district court (Pet. 13a-19a) is reported at 307 F. Supp. 888.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1971. The petition for a writ of

certiorari was filed on May 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Hatch Act, 5 U.S.C. 1501 *et seq.*, 5 U.S.C. (Supp. V) 7324, 7325, is constitutional insofar as it bars partisan political activity by a State employee engaged in work on a federally-funded program.

STATEMENT

This action was instituted by William Lightsey and the Northern Virginia Regional Park Authority against the Civil Service Commission to review a Commission ruling that Lightsey had violated the Hatch Political Activities Act, 5 U.S.C. 1501 *et seq.*[1]

In relevant part, the Hatch Act directs that an "individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency" may not, *inter alia*, "take an active part in political management or in political campaigns". 5 U.S.C. 1501(4), 1502(a)(3). Its prohibitions do not include state or local officers or employees who hold certain enumerated positions or who hold elective office; individuals in the latter category are specifically exempt from the bar against actively participating in political campaigns. 5 U.S.C. 1502(c)(1)-(4).

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[1] The pertinent provisions of the Act are set out in the petition at pp. 41a-47a.

If the Civil Service Commission finds that a covered employee violated the Act's prohibition, the Commission may determine that the violation warrants removal (5 U.S.C. 1505). If the state or local government agency declines to remove such employee, the federal grant or loan financing the program with which the employee is connected may be reduced by an amount equal to twice the employee's yearly salary (5 U.S.C. 1506).

The facts of this case are not in dispute. Petitioner Lightsey was employed as the executive director and administrative head of the Northern Virginia Regional Park Authority, which is federally funded. While thus employed, he campaigned for re-election on a partisan basis as a member of the Virginia General Assembly. The Civil Service Commission held that this activity violated 5 U.S.C. 1502(a)(3) and that Lightsey's removal was warranted. When the Park Authority failed to remove him, the Commission ordered that $26,400 (twice Lightsey's annual salary) be withheld from the federal grant to the Authority. 5 U.S.C. 1506(a).

Petitioners brought this suit seeking reversal of the Commission order on the ground that Lightsey was exempt from the Hatch Act because he was an individual holding elective office. 5 U.S.C. 1502(c)(4). The district court rejected that argument and entered summary judgment in favor of the Commission (Pet. 13a-19a). On appeal petitioners again asserted that Lightsey was not covered by the Act, but also urged, for the first time, that the Act's ban on partisan political activities violated the First Amend-

ment. In addition to rejecting the statutory argument (which petitioners do not renew in this Court), the court of appeals held that the decisions of this Court in *United Public Workers* v. *Mitchell*, 330 U.S. 75, and *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, upholding the Act against similar challenges were dispositive on the constitutional issue (Pet. 1a-2a).

ARGUMENT

This is the fourth of a series of cases arising within the last fifteen months in which the Court has been asked to reexamine and overrule *United Public Workers* v. *Mitchell*, 330 U.S. 75, or *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, which upheld the constitutionality of the Hatch Act. The Court has refused to review the three earlier cases, in which substantially the same arguments were made as are here presented. The considerations that led the Court to deny review in two of those cases[2] are equally persuasive here, and call for the same result.

1. In *Mitchell*, a federal employee challenged on First, Fifth, Ninth and Tenth Amendment grounds the constitutionality of the provision in the Hatch Act (5 U.S.C. 7324(a)(2)) which prohibited an officer or employee in the executive branch of the federal

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[2] See *Hobson, et al.* v. *Board of Elections for the District of Columbia, et al.*, No. 1494, this Term, certiorari denied, May 17, 1971; *Kearney* v. *Macy*, 409 F. 2d 847 (C.A. 9), certiorari denied, 397 U.S. 943. In *Fishkin* v. *Civil Service Commission*, 309 F. Supp. 40 (N.D. Cal.), the appeal was dismissed for failure to docket the case within the time prescribed by Rule 13 of the Rules of this Court, 396 U.S. 278.

government from "tak[ing] an active part in political management or in political campaigns" (330 U.S. at 94, 95). Petitioners claim that the Hatch Act provision (5 U.S.C. 1502(a)(3))[3] placing identical limitations on state or local officials whose principal employment is in connection with a federally financed activity violates the same constitutional provisions.

In rejecting the constitutional attack in *Mitchell*, this Court concluded that the Hatch Act constituted a valid exercise of governmental authority to control actions which "in the judgment of Congress menace the integrity and the competency of the [civil] service" (*id.* at 103). As this Court pointed out, Congress had determined that government employees who were active in partisan politics constituted a "danger to the [civil] service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections" (*id.* at 98). Aware of earlier periods in our history when there was little if any delineation between government employment and partisan politics, the Court further noted that Congress could have properly found that "government employees are handy elements for leaders in political policy to use in building a political machine" (*id.* at 101). Finally, this Court emphasized the limited scope of the Act, explaining that it was "only partisan

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[3] The phrase "an active part in political management or in political campaigns" is defined in an identical manner for purposes of both Section 7324(a)(2) and 1502(a)(3). See 5 U.S.C. 1501(5) (state employees); 5 U.S.C. 7324(a) (federal employees).

political activity that [has been] interdicted" (*id.* at 100).

Similar considerations prompted the legislative judgment to bring within the Act's coverage those individuals who are employed by state and local governments in connection with federally-financed programs. Congress was concerned that funds granted or loaned to the states and municipalities should not be used to build political machines, and that employees paid by federal funds should not be demoralized by demands that they engage in partisan political activity. See 86 Cong. Rec. 2352, 2494, 2625, 2626 (1940) (remarks of Senator Hatch); 86 Cong. Rec. 9361 (1940) (remarks of Congressman Dempsey).

In the *Oklahoma* case a constitutional challenge to the Hatch Act by the State of Oklahoma based on Tenth Amendment grounds was squarely rejected. Holding that the Act constituted a valid exercise of the power to spend federal funds, this Court explained (330 U.S. at 143):

> While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.
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> * * * The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. * * *

2. Petitioners do not seek to distinguish *Mitchell* or *Oklahoma*. They argue rather that the First Amendment protections have been enlarged since those cases were decided in 1947 and that the Hatch Act cannot be upheld under the more recent decisions of this Court. The flaw in this argument is that the cases relied upon arose in different contexts and did not purport to impair the continuing vitality of this Court's carefully considered holdings in *Mitchell* and *Oklahoma*.

Indeed, the policy considerations upon which the *Mitchell* and *Oklahoma* decisions were based are no less important today than they were in 1947. Those decisions were not, as the petition seems to suggest (Pet. 7-8), grounded upon an assumption that the Act affected only a small number of persons. As the dissenting opinion in *Mitchell* pointed out (330 U.S. at 106), some three million federal and many thousands of state employees were then barred by the Hatch Act from certain political activities if those employees wished to continue their government employment. It is true that a substantial increase in the number of government employees has occurred during the ensuing period. But throughout this period of growth the effectiveness and integrity of the federal career service and of federally-financed state programs have been maintained in no small measure because of the insulation from political influence engendered by the prohibitions of the Act. Experience has thus reconfirmed the correctness of the *Mitchell* and *Oklahoma* decisions and the wisdom of the Act itself. In short, while government employees undoubt-

edly enjoy political rights (see Pet. 5), fundamental considerations of policy require certain limited regulation of those rights in the area of partisan politics.[4]

The constitutional principle advanced by petitioners (Pet. 5-6)—that laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at—was firmly established at the time of the *Mitchell* and *Oklahoma* decisions. 330 U.S. at 110, and note 5 (dissenting opinion). These decisions were thus considered when the Act was upheld as sufficiently precise and narrowly drawn to withstand constitutional attack. Even in this constitutionally sensitive area, Congress is not restricted to enacting laws which would require cumbersome and perhaps ineffective case-by-case administration, but may utilize realistic legislative classification adequate to eliminate the potential for evil with which it is legitimately concerned. The danger of politicization of the federal civil service and of federally financed state programs is no less real today than it was in 1947.[5]

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[4] The Act does not prohibit nonpartisan political activity and certain other conduct relating to political activity. See 5 U.S.C. (Supp. V) 7326, 7327.

[5] The state cases relied upon by petitioners (Pet. 8) do not purport to limit the *Mitchell* or *Oklahoma* rulings in any way, but were decided with reference to the particular statutory framework involved. For example, *Huerta* v. *Flood*, 103 Ariz. 608, 447 P.2d 866, involved the validity of a statutory provision which made it a *crime* for a state supervisory official to coerce an employee to turn over any part of his salary for political purposes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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